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3:00 PM 1/28/99

COURT  


5 Attorney for Defendant, Michelle Gutierrez Ott

6  
7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF COCHISE

8 STATE OF ARIZONA,

9 Plaintiff,

10 vs.

11 MICHELLE GUTIERREZ OTT,

12 Defendant.

\*\*\*

) No. CR98000549  
)


) MOTION FOR REDETERMINATION  
) OF PROBABLE CAUSE  
) (Rule 12.9, Arizona Rules of Criminal  
) Procedure)

) (Assigned to: Hon. Matthew W.  
) Borowiec, Division One)  
)

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14  
15 COMES NOW, MICHELLE GUTIERREZ OTT, by and through her  
16 undersigned counsel, and respectfully moves this court to remand this case to the Grand  
17 Jury for redetermination of probable cause. This motion is made pursuant to Arizona  
18 Rules of Criminal Procedure, Rule 12.9; the Fourteenth Amendment of the United State  
19 Constitution; and Article 2 of the Arizona Constitution. This motion is further supported by  
20 the accompanying Memorandum of Points and Authorities. Defendant also joins  
21 the Motions for Redetermination of Probable Cause filed by Defendants Packer and the  
22 Damianos.

23 RESPECTFULLY SUBMITTED this 28th day of January, 1999.

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25   
26 JEFFREY S. SIIRTOLA  
Attorney for Defendant  
Michelle Gutierrez Ott

1  
2 MEMORANDUM OF POINTS AND AUTHORITIES

3 A. THE PROSECUTORS FAILED TO PROPERLY DEFINE AND  
4 ADEQUATELY INSTRUCT THE GRAND JURY IN THE LAW

5 Rule 12.9(a) of the Arizona Rule of Criminal Procedure sets forth the grounds  
6 for challenges to the Grand Jury proceedings. It states:

7 "The grand jury proceedings may be challenged only by motion for a new  
8 finding of probable cause alleging that the defendant was denied a  
9 substantial procedural right, or that an insufficient number of qualified grand  
10 concurred in the finding of the indictment."

11 In this case, Mrs. Gutierrez Ott was denied a substantial procedural right  
12 because the prosecutors failed to properly define and adequately instruct the Grand Jury  
13 on the law applicable to a criminal case such as this.

14 This case is a complicated case involving an allegation of conspiracy, during  
15 which Mrs. Gutierrez Ott is alleged to have committed various acts in violation of Arizona  
16 Revised Statutes. The prosecutor has an obligation, as legal advisor to the Grand Jury,  
17 not only to inform the Grand Jurors of what the law is, but also to instruct all members of  
18 the Grand Jury panel in how various terms used or charged within any particular statute  
19 have been defined. The prosecutor in this case failed to accurately inform the Grand  
20 Jurors of what the law is and failed to define key terms within those laws.

21 In *State v. Emery*, 131 Ariz. 493, 642 P.2d 838 (1982), the Arizona Supreme  
22 Court held that :

23 "If a state resorts to the grand jury procedure, the due process and equal  
24 protection clauses of the fourteenth amendment requires utilization of an  
25 unbiased grand jury and the presentation of the evidence in a fair and  
26 impartial manner."

27 Arizona Revised Statute, section 13-1103 (a), defines the legal prohibition  
28 against conspiracy. It reads as follows:

1 "A person commits conspiracy if, with the intent to promote or aid the  
2 commission of an offense, such person agrees with one or more persons  
3 that at least one of them or another person will engage in conduct  
4 constituting the offense and one or more of the parties commits an overt act  
5 in furtherance of the offense, except that an overt act shall not be required  
6 if the object of the conspiracy was to commit any felony upon the person of  
7 another, or to commit an offense under section 13-1508 or 13-1704."  
8 [Emphasis added.]

9 In this case, the prosecutors failed to define the term "overt" act for the  
10 Grand Jurors.

11 On the one hand, the definition of an "overt act" was neither addressed nor  
12 was any definition of an overt act ever presented to the Cochise County Grand Jury when  
13 it was originally impaneled on September 4, 1998 (see Transcript of Cochise County  
14 Grand Jury Impanelment, September 4, 1998, attached hereto as Defendant's Exhibit A).

15 On the other hand, in the Grand Jury Transcript, December 18, 1998, at  
16 page 11, it appears as if the prosecutor intended to ask the members of the Grand Jury  
17 if they had been instructed on the law associated with the charges in the indictment.  
18 However, the prosecutor only asked them if they had been instructed on Arizona Revised  
19 Statute, section 13-2204. The prosecutor asks:

20 "Has the grand jury been instructed on all of the — basically what would be  
21 at issue would be defrauding a judgement creditor, and that's 13-2204."

22 The foreman then stated they had not been read that statute. The prosecutor  
23 read the statute to the Grand Jurors, but did not read the conspiracy statute nor any of the  
24 other statutes contained in the State's indictment. This presentment to the grand jury was  
25 done on December 18, 1998, some four (4) months after the Grand Jury had been  
26 originally instructed.

It is mandatory that the prosecutor ensure that the Grand Jurors are properly  
instructed on all of the laws mentioned in the indictment. Even assuming the Grand Jurors  
would remember instructions given to them four months prior, these omissions are, in and

1 of themselves, a denial of a substantial procedural right to the defendant, especially when  
2 the complexity of this case is considered.

3 In addition, the definition of the term "overt act," 13-1003 (the conspiracy  
4 statute), was never defined for the Grand Jurors, either in the original impanelment, or  
5 when this case was presented to them (see attached Exhibit B, transcript of the Grand Jury  
6 proceedings on December 18, 1998).

7 In *State v. Bauman*, 125 Ariz. 404, 610 P.2d 38 (1980), the Arizona Supreme  
8 Court found it was proper to remand for a redetermination of probable cause, a conspiracy  
9 charge (in a securities fraud conspiracy case), because the assistant attorney general  
10 failed to explain the overt act requirement of the Arizona laws of conspiracy. The assistant  
11 attorney general in the *Bauman* case failed to explain the overt act requirement to the  
12 grand jury, and was in and of itself is sufficient reason to order a remand. The *Bauman*  
13 case is exactly on point with the definitions omitted in the instant case.

14 In *State v. Crimmins*, 137 Ariz. 39, 668 P.2d 882 (Ariz. 1983), the Arizona  
15 Supreme Court held:

16 "... it was the duty of the prosecutor as legal advisor to the grand jury to  
17 instruct on that law. The omission of that legal advice, considered with the  
18 inaccurate testimony, rendered the presentation of this case less than fair  
and impartial as required by *State v. Emery, supra*."

19 In the instant case, not only did the prosecutor omit instruction on key  
20 elements of the law, but the testimony elicited from the State's witness was riddled with  
21 inaccuracies. This failure on the part of the prosecutor crosses the threshold established  
22 by Rule 12.9 for violation of a substantial procedural rights.

23 The prosecutor compounds the violation of the Defendants' rights, when she  
24 advises the Grand Jurors as to the legal meaning of A.R.S., section 13-2204. The  
25 prosecutor stated on page 12 of the grand jury transcript (Exhibit B):

26 /// /// ///

1 "Basically what is being said here is that if you have a creditor that has an  
2 interest in a piece of property, which effectively means that they have a lien,  
3 then they have some ownership interest in that property, until such time as  
4 the monies that are due and owing on the property are taken care of or  
5 whatever else needs to happen in order for the property to be freed up; that  
6 if someone else comes along and takes some type of action. Should  
7 conceal, should transfer, convert or in any way encumber that security  
8 interest, that that, depending upon the circumstances surrounding that  
9 activity, in fact could be viewed as an attempt to defraud or withhold from  
10 the legitimate interest holder his rights to that particular property."

11 A.R.S., section 13-2204, actually reads as follows:

12 "A person commits defrauding secured creditors if a person knowingly  
13 destroys, removes, conceals, encumbers, converts, sells, obtains, transfers,  
14 controls or otherwise deals with the property subject to a security interest  
15 with the intent to hinder or prevent the enforcement of that interest."  
16 [Emphasis added.]

17 The prosecutor failed to mention that the statute requires a "knowingly" and  
18 an "intentionally" mental state, and failed to define these critical terms to the Grand Jurors.  
19 This omission again deprives the defendant of a substantial procedural right.

20 In addition to this omission, the prosecutor incorrectly instructs the Grand  
21 Jurors by inserting language not contained in the statute. The prosecutor incorrectly  
22 instructs the grand jurors when she states, "... depending on the circumstances  
23 surrounding the activity, in fact could be viewed as an attempt to defraud or withhold from  
24 the legitimate interest holder his rights to that particular property. The statute does not  
25 contain that language. In addition, she incorrectly inserts the element of "attempt" which  
26 again is not included in the language of the statute. The principle set forth in *State v.*  
*Bauman, supra*, indicates these omissions and inaccuracies are proper grounds to remand  
this case for a redetermination of probable cause.

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1           B.     THE GRAND JURY WAS NOT PRESENTED WITH  
2                 SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF  
3                 PROBABLE CAUSE

4           As a result of the omissions and incorrect statements of law made by the  
5     prosecutor, there was no testimony presented to the Grand Jury on critical elements of the  
6     indictment.

7           Arizona Revised Statutes, section 13-2204, requires that a defendant  
8     "knowingly" commit the acts before the crime of defrauding a creditor is committed. Since  
9     the term "knowingly" was never defined for the Grand Jurors, it is not possible for the  
10    Grand Jurors to know if this mental state existed in the minds of any of the defendants.  
11    Section 13-2204 also requires a mental state of "intentionally" be proven. Again, since that  
12    term was not defined, it is not possible for the Grand Jurors to know if the mental state  
13    existed. There is absolutely no evidence presented to the Grand Jurors that any of the  
14    defendants had the required mental state the statute requires; therefore, the finding of  
15    probable cause cannot be supported. The erroneous finding of probable cause denied the  
16    defendant a substantial procedural right.

17           The law in Arizona is clear that the kind of evidence that is presented to a  
18    grand jury, or its weight for sufficiency cannot be attacked. However, the total lack of any  
19    evidence on critical issues of law renders the Grand Jury's findings of probable cause to  
20    be null and void.

21           In *U.S. v. Keith*, 605 F.2d 462 at 464 (9th Cir., 1979), the Ninth Circuit  
22    Federal Court of Appeals held that a defendant cannot be convicted on the basis of facts  
23    not found, and perhaps not presented to, a grand jury:

24           "To allow a prosecutor or court to make a subsequent guess as to what was  
25    in the minds of the grand jury at the time they returned the indictment would  
26    deprive the defendant of the basic protection that the grand jury was  
   designed to secure, because a defendant could then be convicted on the  
   basis of facts not dawned by, and perhaps presented to the grand jury that  
   indicted him."

1 The United State Supreme Court clearly states in *Russell v. United States*,  
2 369 U.S. 749 (1962) that a defendant cannot be convicted on the basis of facts not  
3 presented to the grand jury.

4 There is no evidence anywhere in the grand jury transcript which would  
5 indicate the defendant did anything other than what she was authorized to do in the course  
6 of her employment, and there certainly is not one iota of evidence to indicate she  
7 knowingly or intentionally committed any criminal acts or agreed to commit any criminal  
8 acts with any persons.

9 The entire indictment is based entirely on supposition and innuendo. The  
10 evidence presented does not rise to the level of probable cause any crime was committed  
11 by any one of the defendants.

12 C. THE GRAND JURORS WERE TAINTED BY IMPROPER  
13 COMMENTS BY GRAND JUROR LEWIS

14 On pages 4-5 of the grand jury transcript, the following exchange between  
15 the prosecutor and grand juror Lewis occurred:

16 "I'd like to ask the grand jury if you know any of the defendants in this case.

17 Grand juror Lewis: Lewis.

18 Ms. Goodwin: Yes?

19 Grand Juror Lewis: I need to tell the court that I reported — is this the  
20 Douglas Packer who was C.E.O. of Southeastern Federal Credit Union?

21 Ms. Goodwin: That is correct.

22 Grand Juror Lewis: I reported this man to the banking commission myself  
and to the American Credit Union Association."

23 The prosecutor goes on to question Grand Juror Lewis as to whether he  
24 could be fair and impartial. Mr. Lewis stated he promises to be fair and impartial. The  
25 prosecutor then excused Mr. Lewis to avoid the appearance of impropriety.

26 /// /// ///

1 It is clear the prosecutor recognized the possible prejudicial effect of Grand  
2 Juror Lewis' irrelevant comments; however, she does not attempt to ascertain whether any  
3 of the other grand jurors were prejudiced by these comments. It is clear the fact that a  
4 complaint was filed by Grand Juror Lewis against Defendant Packer tends to prejudice  
5 Defendant Packer. It also tends to prejudice the other defendants because of their working  
6 relationship with Defendant Packer. A bell cannot be unrung once it is rung, but the  
7 prosecutor could have questioned the rest of the grand jurors to determine if they could  
8 be fair and impartial to the defendants after hearing Grand Juror Lewis' inappropriate  
9 statements. The failure to do so raises the appearance of impropriety the prosecutor  
10 hoped to avoid by excusing Grand Juror Lewis. The only way to remedy the taint is to  
11 remand the case to another grand jury. The court in *Emery, supra*, stated:

12 "Bias in a grand juror is predicated upon "[w]hether the existence of a state  
13 of mind on the part of the juror is such as will prevent him from acting with  
entire impartiality."

14 See also *State v. Salazar*, 27 Ariz. App. 620, 624, 557 P.2d 552, 556 (1976).

15 In this case, we will never know if the Grand Jurors could have performed  
16 with "entire impartiality" because of the prosecutor's failure to take a subsequent remedial  
17 action after the inflammatory and irrelevant comments by Grand Juror Lewis. Nor can it  
18 be determined if the other defendants were prejudiced because of guilt by association.  
19 The only remedy is remand.

20 The United States Supreme Court in *Murphy v. Florida*, 421 U.S. 794, 800  
21 n. 4, 95 S.Ct. 2031, 2036 n. 4, 44 L.Ed2d 589 (1975) stated:

22 "To hold that the mere existence of any preconceived notion as to the guilt  
23 or innocence of an accused, without more, is sufficient to rebut the  
24 presumption of a prospective juror's impartiality would be to establish an  
impossible standard. It is sufficient if the juror can lay aside his impression  
25 or opinion and render a verdict based On the evidence presented in court."  
[Emphasis added.]

26 /// /// ///




1 Since the prosecutor did not take any actions to see if the other grand jurors  
2 were biased by Grand Juror Lewis' comments, it stands to reason the sufficiency standard  
3 set forth in *Murphy* cannot be met. There was a clear remedy to the problem and the  
4 prosecutor chose not to utilize that remedy. Now the only remedy is to remand the case  
5 to another grand jury, free of bias and taint, for a redetermination of probable cause.

6 CONCLUSION

7 It is clear based, on the record, that defendant Michelle Gutierrez Ott was  
8 denied substantial due process and, as a result, was denied substantial procedural rights  
9 when her case was presented to the Grand Jury. It is incumbent upon this court to remand  
10 this case to a new grand jury for redetermination of probable cause.

11 DATED this 29th day of JANUARY, 1999.

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14 \_\_\_\_\_  
15 JEFFREY S. SIIRTOLA  
16 Attorney for Defendant,  
MICHELLE GUTIERREZ OTT

17 Copies of the foregoing mailed  
18 this \_\_\_\_ day of \_\_\_\_\_, 1999, to:

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